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7 **UNITED STATES DISTRICT COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**  
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10 RAYMOND TSCHUDY, individually, on  
11 behalf of himself, all others similarly situated,  
12 and on behalf of the general public,

13 Plaintiff,

14 vs.

15 J. C. PENNEY CORPORATION, INC., a  
16 Delaware corporation; and DOES 1 to 100,  
17 inclusive,

18 Defendants.  
19

Case No.: 11cv1011 JM-CAB

**ORDER GRANTING MOTION FOR  
LEAVE TO FILE AMENDED  
COMPLAINT**

Docket Nos. 8, 13

20 Plaintiff Raymond Tschudy filed a class action complaint in San Diego Superior Court on  
21 April 5, 2011, alleging that Defendant J.C. Penney Corporation, Inc. ("JCP") violated several  
22 California laws by failing to provide legally mandated vacation benefits. JCP removed the  
23 action to this court on May 9, 2011, and then moved for judgment on the pleadings as to the first  
24 claim (under Cal. Labor Code §200) on the ground that it is time-barred. Plaintiff thereafter  
25 moved for leave to file an amended complaint. Both motions were taken under submission. For

1 the reasons stated below, the motion for leave to amend the complaint is GRANTED, and the  
2 motion for judgment on the pleadings is DENIED as moot.

### 3 **I. BACKGROUND**

4 The complaint filed by Tschudy purports to represent a class of former and current  
5 California employees of JCP. Its principal allegation is that JCP's California employees "are  
6 forced to forfeit, without compensation, all accrued and unused paid vacation if such employees  
7 are not employed on the first day of the calendar month following the month or months during  
8 which such paid vacation benefits were earned." ¶ 8. The complaint also states that the statute  
9 of limitations on the claims should be equitably tolled based on JCP's representations that its  
10 policies and practices were lawful. ¶ 9.

11 The complaint sets forth two causes of action. First, it alleges a violation of Cal. Labor  
12 Code §200, et seq., based on forfeiture of wages. The second cause of action alleges unlawful  
13 business practices in violation of Cal. Bus. & Prof. Code §17200, et seq.

14 JCP removed the action to this court and shortly thereafter moved for judgment on the  
15 pleadings under Rule 12(c), arguing that the statute of limitations prevents the court from hearing  
16 Tschudy's first claim. Tschudy opposes the motion on the basis of equitable tolling and requests  
17 leave to file an amended complaint naming additional class representatives from California and  
18 Illinois.  
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### 20 **II. LEGAL STANDARD**

21 As the parties agree, leave to amend should be freely granted under Rule 15(a)(2) when  
22 justice so requires. Zucco Partners, LLC v. Digimarc Corp., 552 F. 3d 981, 1007 (9th Cir. 2009).  
23 Factors to consider in determining whether to allow amendment include undue delay, bad faith,  
24 dilatory motive, undue prejudice, and futility. Id. JCP claims that it will face undue prejudice if  
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1 an amendment is allowed; it also argues several of the proposed amendments would be futile. In  
2 addition to the factors listed above, Ninth Circuit courts consider whether parties have previously  
3 amended their pleadings. Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir. 2004).

### 4 **III. DISCUSSION**

#### 5 **A. Prejudice**

##### 6 1. Differing Class Periods

7 First, JCP argues that amending the complaint would result in two different class periods:  
8 one for the Labor Code claims, which have a three-year statute of limitations, and one for the  
9 Business and Professions Code claims, which would reach back four years. In broad brush, JCP  
10 claims that (1) Tschudy's Labor Code claims are time-barred, (2) he, therefore, lacks standing to  
11 represent other class members with such claims, and (3) as a result, their claims will not relate  
12 back to the time Tschudy filed his original complaint. In conclusion, JCP merely states that  
13 existence of two different class periods would "unnecessarily complicate this action," causing  
14 prejudice.  
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16 JCP provides no case law authority in which a court denied leave to amend based on  
17 purported prejudice created by two different class periods, while several district court cases have  
18 contemplated different class periods without finding prejudice. See, e.g., In re Charles Schwab  
19 Corp. Securities Litigation, 264 F.R.D. 531 (N.D. Cal. 2009) (setting different time periods for  
20 two classes where each class was based on distinct claim under Securities Act of 1933).

21 Plaintiff correctly notes that courts routinely allow amendments to class complaints if an  
22 original plaintiff will not adequately represent the class because of a time-bar. Even without the  
23 time-bar issue, there would be different class periods because the claims have different statute of  
24 limitations periods. JCP does not explain why having the three-year period run from the time of  
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1 the new plaintiffs' filing would prejudice them more than having the three-year period run from  
2 the date Tschudy filed the initial complaint.

## 3 2. Parallel Class Actions

4 JCP also argues that allowing an amended complaint will create prejudice by "spawn[ing]  
5 parallel class actions." According to JCP, this would create complication by requiring  
6 application of two states' laws, expanding the size of the classes, and expanding discovery.  
7 Plaintiff counters that Illinois law is similar to California law, and that both claims could be  
8 litigated more easily in one court.

9 JCP cites Loehr v. Ventura County Cmty. Coll. Dist., 743 F.2d 1310, 1320 (9th Cir.  
10 1984) for the proposition that leave to amend should be denied when additional claims would  
11 cause substantial complication. However, the plaintiff in Loehr sought to alter the case much  
12 more than Tschudy does here. The plaintiff "wished to add seven pendent state law claims, three  
13 new federal claims, two additional defendants, and new allegations" at a comparatively late point  
14 in the litigation. Id. at 1313, 1320. The Ninth Circuit upheld the district court's denial of leave  
15 to amend based on futility, but noted that they did not believe granting leave to amend would  
16 have caused great prejudice. Id. at 1320.<sup>1</sup>

17  
18 Finally, arguments concerning variations between states' laws are more properly put forth  
19 in opposition to a motion for class certification. JCP's prejudice argument does not explain why  
20 the amendment itself, rather than the makeup of the proposed class, would be harmful. The court  
21 can later deny class certification if it finds that the Illinois law claims prevent the putative class  
22 from meeting Rule 23's requirements. See, e.g., Zinser v. Accufix Research Institute, Inc., 253  
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24 <sup>1</sup> JCP also cites iRise v. Axure Software Solutions, Inc., 2009 U.S. Dist. LEXIS 102189 (C.D. Cal. 2009) to no avail.  
25 Though that case set forth the Ninth Circuit standard for undue prejudice, it rightly focused on amendment that  
would cause complications arising "at a late hour." Id. at \*27. Here, before discovery has taken place, concern with  
raising different theories or facts is not as great.

1 F.3d 1180, 1189 (9th Cir. 2001) (affirming district court’s refusal to certify class when it was  
2 apparent that the laws of 48 different states might apply and plaintiffs put forth no manageable  
3 trial plan).

#### 4 **B. Futility**

##### 5 1. PAGA Claim

6 As part of the proposed amended complaint, Plaintiff has added a claim under Cal. Labor  
7 Code §2699 (“PAGA”) and seeks to recover civil penalties. Before filing a PAGA claim, a  
8 plaintiff must provide notice to the Labor and Workforce Development Agency (“LWDA”).  
9 Cal. Labor Code §2699.3. If the aggrieved employee does not receive notice of LWDA’s intent  
10 to investigate within 33 days of the notice, the employee may bring suit. Id. Furthermore,  
11 Defendant points out that there is a one-year statute of limitations for PAGA claims. See, e.g.,  
12 Thomas v. Home Depot USA, Inc., 527 F.Supp.2d 1003, 1007 (N.D. Cal. 2007) (rejecting  
13 argument that limitations period for PAGA claims should be based on underlying Labor Code  
14 violation).  
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16 Because Tschudy has not worked for JCP since February of 2008, Defendant argues he  
17 did not timely exhaust administrative remedies. If this is correct, the proposed new plaintiffs  
18 must separately exhaust their own administrative remedies. Tschudy explains that the proposed  
19 California plaintiffs have now made proper filings to exhaust administrative remedies. Plaintiff  
20 asserts that the 33-day window will expire on September 23, 2011, and if no notice has been  
21 received from LWDA, leave should be granted for the new plaintiffs to make PAGA claims.<sup>2</sup>  
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25 <sup>2</sup> The court has not received information concerning LWDA’s decision. If LWDA has indeed indicated an intent to investigate, that decision may affect the continued existence of the PAGA claim in the amended complaint.

## 2. The Illinois Arbitration Agreement

Defendant also argues that it would be futile for the proposed Illinois plaintiff to be added to the suit because he entered into an arbitration agreement with JCP. JCP provides several cases from outside the Ninth Circuit to show that trial courts are willing to declare an amendment futile because of an arbitration agreement.<sup>3</sup> Plaintiff vigorously argues that the court should be more fully briefed on the arbitration agreement before making a decision on its enforceability.

Neither party cites any case from the Ninth Circuit concerning the issue, though one recent case from the Northern District of California addresses it. In In re TFT-LCD Antitrust Litigation, the court granted leave to amend, but stayed some of the plaintiff's claims pending arbitration. 2011 WL 3353867 at \*3 (N.D. Cal. 2011). The court also noted that "[s]ome courts have been reluctant to address arbitrability in the context of a motion to amend." Id. at 2. However, it decided to address the arbitrability issue because both parties had been involved in the litigation for years and the court saw no benefit in delaying decision.

Here, the court would benefit from further briefing on the arbitrability issue before a decision is made. To deny leave to amend would be premature considering the dearth of information and argument the court has seen.

## IV. CONCLUSION

Granting Tschudy leave to file an amended complaint will not cause undue prejudice, and JCP has not sufficiently demonstrated that the proposed amendments will be futile. There has

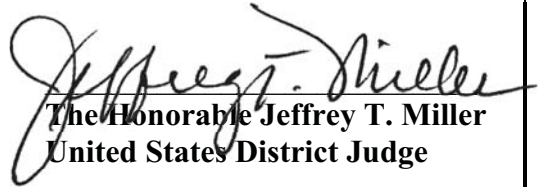
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<sup>3</sup> In Halliburton v. Henderson, Few & Co., the Eleventh Circuit affirmed a district judge's finding of futility based on an arbitration clause, but that case had progressed much further than this one, and the defendant had already submitted a motion to compel arbitration on all of the plaintiff's original claims. 774 F.2d 441, 445 (11th Cir. 1985). And in Mills v. Marjam Supply Co., the court denied leave to amend because of an arbitration clause. 2009 U.S. Dist Lexis 6760 at \*7-9 (D.N.J.). In that case the plaintiff did not "raise any objection to or argument against the arbitration clause." Id. In Kelly v. MBNA America Bank, the Delaware court had already dismissed other claims as barred by the Federal Arbitration Act and the court treated Plaintiff's entire case as somewhat frivolous. 528 F.Supp.2d 490, 492 (D. Del. 2008).

1 been no showing of bad faith, dilatory motive, or undue delay, and Tschudy has not previously  
2 sought to amend the complaint. Therefore, the motion for leave to amend is GRANTED, and the  
3 motion for judgment on the pleadings is DENIED as moot. The proposed First Amended  
4 Complaint is hereby adopted as the operative complaint. Defendant shall have twenty days from  
5 the release of this order to file any responsive pleadings.

6 **IT IS SO ORDERED.**

7 DATED: October 24, 2011

8   
9 The Honorable Jeffrey T. Miller  
10 United States District Judge  
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